Supreme Court, U.S.
FILED
OCT 19 2010
OFFICE OF THE CLERK

173 (2)

No. 10-374

IN THE

Supreme Court of the United States

LISA M. ZURESS

Petitioner,

v.

MICHAEL B. DONLEY, ACTING SECRETARY, UNITED STATES DEPARTMENT OF THE AIR FORCE

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN ASSOCIATION FOR JUSTICE AND EQUAL RIGHTS ADVOCATES AS *AMICI CURIAE* SUPPORTING GRANTING A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the *Feres* doctrine bar relief under civil rights statutes to dual-status technicians who perform civilian roles within military departments?

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INTEREST OF *AMICI CURIAE*[1]

The American Association for Justice ("AAJ") and Equal Rights Advocates ("ERA") respectfully submit this brief as *amici curiae*.[2] AAJ is a voluntary national bar association whose members represent plaintiffs in civil actions. AAJ has participated as *amicus curiae* before this Court in dozens of cases of importance to AAJ members and to the public. AAJ members routinely represent large numbers of persons in employment and civil rights actions and represent members of the military in a wide range of actions.

ERA is a national non-profit law firm located in San Francisco, California dedicated to protecting and securing equal rights and economic opportunities for women and girls through litigation, advocacy, and a national toll-free legal hotline. Since its inception in 1974 as a teaching law firm focused on sex-based discrimination, ERA has litigated some of the nation's most important gender-based discrimination cases which have resulted in new law and provided significant benefits to large groups of women, including *Geduldig v. Aiello*, 417 U.S. 484 (1974) and *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977). ERA has represented clients in numerous individual and class sex discrimination

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[1] Pursuant to Rule 37.6, *amici curiae* states that no counsel for a party authored any part of this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

[2] All counsel of record were notified of *amici*'s intent to file an *amicus* brief pursuant to Rule 37. The parties have supplied letters consenting to the filing of this brief. Those letters are submitted with this brief.

cases under Title VII, including *AT&T Corp. v. Hulteen*, 129 S.Ct. 1962 (2009) and *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 3d (9th Cir. 2010), *petition for cert. filed*, (August 25, 2010) (No.10-277). ERA has also appeared as *amicus curiae* in a number of Supreme Court cases involving the interpretation of Title VII, including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 1994 U.S. Dist. LEXIS 19928; 66 Fair Empl. Prac. Cas. (BNA) 1886 (M.D. Tenn. 1994); *Faragher v. Boca Raton*, 522 U.S. 1105 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998), *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); and *Ledbetter v. Goodyear*, 127 S.Ct. 2162 (2007). During the past three decades, ERA has worked closely with women workers in male-dominated spheres to expand and protect their employment rights and opportunities and these efforts extend to ensuring the civil rights of women in the military.

This case involves the legal status of dual-status technicians ("DSTs") persons who hold civilian jobs but who, as a requirement of those jobs, also hold military commissions. It raises issues regarding how the civil rights laws should be interpreted and whether application of the judicially-created *Feres*[3] doctrine distorts correct interpretation of the will of Congress. These issues have confused the lower courts and have effects beyond the contours of this case. They are of great concern to AAJ and ERA, which urge the Court to resolve them.

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[3] *Feres v. United States*, 340 U.S. 135 (1950).

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Twenty years ago, the Tailhook scandal rocked the military. [4] The eerily parallel facts of this case, in which male aviators hired female sex workers to perform lurid acts, demonstrate that gender discrimination remains a troubling fact of life for women who serve the military, be it as civilians or as uniformed members.

Tailhook was followed in 1996 by a scandal at the Army training facility at Aberdeen, Maryland.[5] Reacting to both, in 1997 Congress, in unambiguous language, seemingly brought dual-status employees of the military within the coverage of the civil rights statutes by deeming them civilian employees.[6] The Circuit courts have split over whether the Congressional command is indeed unambiguous, some finding coverage and some refusing to do so. Even when circuit courts have found coverage, they have split over whether the *Feres* doctrine limits application to only certain aspects of employment. They also have split on whether *Feres* permits or prohibits equitable relief, raising, in turn, a question that, surprisingly, this court has not finally resolved:

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[4] *See* Lieutenant Commander J. Richard Chema, *Arresting "Tailhook": The Prosecution of Sexual Harassment in the Military*, 140 Mil. L. Rev. 1, 15-19 (1993).

[5] *See* Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 Minn. L. Rev. 305, 310-13 (Dec. 1998).

[6] 10 U.S.C.A. § 10216(a)(1). Uniformed military personnel are outside the scope of coverage of Title VII, 42 U.S.C. § 2000e(b)(1), but civilian employees of the military are covered under 42 U.S.C. § 2000e-16(a).

whether backpay and reinstatement under the civil rights acts are legal or equitable remedies. All of those issues are germane to this case.

Ambiguity regarding the availability of civil rights statutes as tools to eradicate discrimination, a goal the military has embraced, impedes progress. Employees do not know if they are protected or what remedies might be available and managers do not know whether they need to create alternative avenues for resolution of employee grievances. Clarification of the scope of civil rights coverage is warranted.[7]

That task requires defining the contours of the *Feres* doctrine, which lower courts have found to create ambiguity where none exists in statutory text. The *Feres* doctrine was created by this Court when women in the military were an afterthought. Its application impedes the goals of the modern military, where women are ubiquitous. Clarification of *Feres* is appropriate here and also will be urged on the Court

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[7] This Court has recognized the importance of racial diversity in the military. *Grutter v. Bollinger*, 539 U.S. 306, 330-31 (2003). The military has recognized racial and gender diversity as similarly important to the function of the military and to a broader societal embrace of equality. *See* U.S. Dep't of Def., Human Goals Charter (July 24, 1998), http://www.srmc.amedd.army.mil/assets/home/eo/documents/forms/Human%20Goals%20Charter.pdf (attaining goals requires creating "an environment that values diversity"). *See also* 32 C.F.R. § 191 (implementing Charter for civilian employees) at 191.4(a) (programs achieving diversity are "essential elements of readiness that are vital to the accomplishment of the DoD national security mission.") and U.S. Dep't of Def., Directive 1350.2 (Aug. 18, 1995), http://www.carson.army.mil/eo/documents/ dod1350.2.pdf (implementing Charter for military employees).

in a petition for *certiorari amici are* informed will be filed in *Witt v. United States*, 2010 WL 1936276 (9th Cir. 2010), due to the Court November 9.[8] *Amici* suggest the court consider that petition simultaneously with this one.

I. THE UGLY REALITY OF CONTINUING GENDER BIAS IN THE MILITARY

In 1950, when *Feres* was decided, women comprised less than two percent of the military, the percentage limited by statute. Women's Armed Services Integration Act of 1948, 62 Stat. 356, 357 (1948). Today, with the statutory barrier having been lifted in 1967,[9] over 200,000 women serve in the military.[10] Women comprise about 25 percent of the Air Force Reserve, Ms. Zuress's service, about 20 percent of the active duty Air Force, and 14 percent of the active duty military.[11] There are almost no functions women do not perform in the military,[12] including serving as officers on submarines.[13]

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[8] *See* Brief of Alexis Witt As *Amicus Curiae* In Support of Petitioner at 5, *Zmysly v. United States*, No. 09-1108, 2009 WL 6363654 (Sep. 16, 2009).

[9] Chema, *supra* n.4, at 9.

[10] U.S. Dep't of Def., *Active Duty Military Personnel by Rank/Grade (Women Only)* (Sept. 30, 2009), http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg0909f.pdf.

[11] Office of the Under Secretary of Defense, Personnel and Readiness, *Population Representation in the Military Services* 16, 22 (2008), http://prhome.defense.gov/MPP/ACCESSION%20POLICY/PopRep2008/summary/chap4.pdf.

[12] *See* Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 Minn. L. Rev. 96, 97 (2008) (footnotes omitted) ("Congress

Gender barriers in the military have not come down readily. As the facts of this case illustrate, misconduct remains brazen. The story of the Tailhook convention in 1991 is grim and well-known.[14] The physical abuse of women, and the existence of a culture that permitted such abuse, led to introspection and significant efforts to eradicate gender bias in the military:

> Tailhook initiated a seismic shift in how the military viewed sexual harassment. Prior to the debacle, sexual harassment was viewed at a micro, individual level, rather than at a macro, cultural level. As the Chief of Naval Operations, Admiral Frank Kelso, told a hearing of the House Armed Services Committee, "Until Tailhook, we dealt too often with sexual harassment at the local level, one case at a time, rather than understanding it as a cultural issue."

Dana Michael Hollywood, *Creating a True Army Of One: Four Proposals To Combat Sexual Harassment In Today's Army*, 30 Harv. J.L. & Gender 151, 158

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repealed the last statutory prohibition on women holding combat positions in 1993, and the military has opened a wide range of combat roles to women. Today, women serve--and die--in combat, as the present war in Iraq has amply demonstrated. Women are barred from an unprecedentedly small and steadily decreasing number of military positions, and only by military regulation rather than statute.").

[13] Iricka Berlinger, *Female Officers Will Join Sub Crews by Jan '12*, Tallahassee Democrat, Sep. 22, 2010, https://www.usna.com/SSLPage.aspx?RSS=acad&referrer=&pid=11199.

[14] *See* Chema, *supra* n.4.

n.47 (2007). *See also* Office of the Inspector Gen., U.S. Dep't of Def., *The Tailhook Report: The Official Inquiry into the Events of Tailhook '91*, at ix (2003) (noting "cultural change"). As is often the case, however, culture changes slowly, and it has not yielded to policy.[15]

Incidents of sexual harassment have declined slightly in recent years, but remain pervasive. A survey released by the Pentagon in 1996 found that of the nearly 50,000 respondents, over half felt they had been sexually harassed in the prior year.[16] That number dropped by about a dozen percentage points by the time of a 2008 Pentagon report, but a third of the women in the military are still reporting that they are experiencing sexual harassment.[17]

Even more troubling, incidents of physical abuse are high, and not only have persisted, but are rising. About half of women who have served in the military report experiencing sexual assault during

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[15] Even with larger numbers of women serving, work environments remain male-dominated, and predictably remain difficult for women. See James Gruber, *The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment*, 12 Gender & Soc'y 301, 314 (1998) (finding that "predominantly male environments are more physically hostile and intimidating than other work environments. Women are more apt to be touched, grabbed, or stalked.")

[16] Elizabeth Gleick, *et al.*, *Scandal in the Military*, Time Magazine, Nov. 25, 1996, http://www.time.com/time/magazine/article/0,9171,985567-1,00.html.

[17] Associated Press, *Pentagon Releases Sexual Harassment Data*, Mar. 14, 2008, http://www.msnbc.msn.com/id/23636487/.

their tours.[18] The most recent data available indicate that incidents of sexual assault investigated by the military rose from 2007 to 2008, and then again from 2008 to 2009.[19]

II. CONFUSION IN THE LOWER COURTS

Whether the civil rights acts provide private remedies to victims of this kind of gender discrimination, or to discrimination more broadly, is a matter of great moment not only to the victims, but to the effort to gain for the nation the benefits of an integrated military. In this case, the lower courts have split over the straightforward task of applying unambiguous statutory language to the question of whether the civil rights acts cover DSTs. The ambiguous contours of the *Feres* doctrine have brought an unwarranted level of complexity to their task, a stunning level of disagreement to their decisions, and frustration to victims whose harms go unremedied.

The immediate question here arises from courts differing on whether the civil rights acts apply to DSTs at all, a question the lower court answered only after wrestling with the *Feres* doctrine and acknowledging a Circuit split. *See* Opinion of Ninth Circuit, Petition at 8a-11a. But the *Feres* doctrine has led to further disagreement in the lower courts, on whether the statutes apply to some functions

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[18] Martin Donohoe, *Violence Against Women in the Military*, Medscape, Sep. 14, 2005, http://www.medscape.com/viewarticle/512380.

[19] U.S. Dep't of Def., Sexual Assault Prevention and Response, *Department of Defense Fiscal Year 2009 Annual Report on Sexual Assault in the Military*, 62 Ex. 5 (Mar. 2010), http://www.sapr.mil/media/pdf/reports/fy09_annual_report.pdf.

DSTs perform, but not others; on whether limitations on application of the statutes come simply from their text or from the *Feres* doctrine; and on whether the *Feres* doctrine bars all relief or merely damages relief, leaving claims for equitable relief justiciable. That is a lot of confusion.

The Federal Circuit, in *Jentoft v. United States*, 450 F.3d 1342 (Fed. Cir. 2006), found that, under the unambiguous 1997 Congressional language, the Equal Pay Act applies to all functions a DST performs and that the judicially created *Feres* doctrine does not thwart the specific instructions of Congress to apply the statute. *Id.* at 1349 ("given the plain language of § 10216(a), we have no discretion not to adjudicate Jentoft's rights under the Equal Pay Act, even under the *Feres* doctrine, which is a judicially-created doctrine.")

The Ninth Circuit below, along with the Second and Fifth Circuits, have found that DSTs are civilian employees, covered by the civil rights statutes, only for purposes of civilian functions of their jobs; because of the *Feres* doctrine, military functions of their jobs are not covered. *Luckett v. Bure*, 290 F.3d 493, 499 (2d Cir. 2002); *Brown v. United States*, 227 F.3d 295, 299 (5th Cir. 2000). Thus, those courts saddle DSTs, employers, and the district courts with the peculiar and difficult burden of applying the statutes to some aspects of an employee's work but not to others, leaving the applicability of civil rights protections dependent, almost literally, on what hat an employee wears while she works.

The Sixth Circuit tolerates no such ambiguity, yielding yet another position: all claims by DSTs are

barred by *Feres*. *Fisher v. Peters*, 249 F.3d 433, 439 (6th Cir. 2001) (noting that it is not appropriate to explore "the facts of the underlying employment action taken which precipitated the suit" because DST "positions are irreducibly military in nature" and therefore a civil rights statute did not apply.)

To add to the confusion litigants and judges face when dealing with DSTs, the First Circuit has held that the *Feres* doctrine does not bar the equitable relief of reinstatement of a person holding a military position. *Wigginton v. Centracchio*, 205 F.3d 504, 513 (1st Cir. 2000), The Eleventh Circuit has specifically disagreed. *Speigner v. Alexander* 248 F.3d 1292, 1297-98 (11th Cir. 2001).[20]

Thus, the circuits split about whether clear statutory language—"For purposes of this section and any other provision of law . . . ," 10 U.S.C.A. § 10216 (a)(1)—is ambiguous; even if unambiguous, whether the *Feres* doctrine trumps the statutory language; and whether, even if the *Feres* doctrine applies to part of civil rights claim, whether it bars only damages relief or also equitable relief. That last split leads to yet another important question that this Court has not resolved, whether reinstatement and backpay under the civil rights act are equitable or legal. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 218 n.4 (2002).

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[20] Both *Wiggington* and *Speigner* involve § 1983 claims by uniformed National Guard officers, not actions by DSTs, but would apply to DSTs even in the broadest formulation of their jobs as purely military.

CONCLUSION

The statutory language in question is a commonly used legislative device.[21] This Court's guidance on its interpretation in light of judge-made doctrine that pre-exists the statute is in itself important but also has ramifications beyond this case. The question of whether DSTs or, indeed, military personnel, have access under *Feres* to equitable relief, even if damages relief is unavailable, is of momentous consequence for enforcement of the civil rights laws, under which reinstatement and backpay are traditionally construed as equitable remedies. *See Great-West Life & Annuity Ins. Co.*, 534 U.S. at 230 n.2 (Ginsburg, J., dissenting). This Court should review this case and address these issues.

Respectfully submitted,

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[21] A Westlaw search of the U.S. Code yields 2,970 instances of the phrase, "any other provision of law."

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